

1 Commission.

2 JUDGE SIPPEL: Well -- yes, go ahead, Ms.  
3 Berlove.

4 MS. BERLOVE: I would offer a helpful  
5 suggestion. Since it is before the Commission, they  
6 have it and they theoretically could rule on it. I  
7 don't know how long it will take for them to rule on  
8 it, but were you to rule on it and the Commission to  
9 rule on it, there's a potential for conflicting  
10 rulings. We would be amenable to a consent motion to  
11 withdraw the Motion to Modify as pending before the  
12 Commission with leave to refile it before your Honor.

13 JUDGE SIPPEL: Well, that makes -- to me  
14 that makes -- I mean, that makes sense because I agree  
15 with you. I'm talking to Ms. Berlove now, and also  
16 with what you said, Ms. Park. I think that the way  
17 the Commission would view this, if anything at all, it  
18 would be as an interlocutory matter because there  
19 hasn't been this -- you know, the proceeding is going  
20 on. There really hasn't been a decision down here  
21 yet, so they'd probably send it back anyway, but  
22 that's hypothetical. The way to cure it is just to

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1 seek leave to withdraw it from the Commission and I'll  
2 treat your motion, Ms. Park, I'm looking at you now,  
3 your Motion to Modify, I'll treat that as being before  
4 myself --

5 MS. PARK: Definitely, yes.

6 JUDGE SIPPEL: -- assuming that it's  
7 clarified that it's not before the Commission.

8 MS. PARK: It's definite -- it was never  
9 intended for the Commission.

10 JUDGE SIPPEL: Yes, but I need something  
11 to clarify, either you send me a copy of your request  
12 to the Commission to withdraw if it is there or  
13 somehow or another -- because you don't have me on the  
14 cover sheet, which is what you're supposed to do under  
15 the rules. You're supposed to address it to me as the  
16 presiding Administrative Law Judge.

17 MS. PARK: Yes, your Honor.

18 JUDGE SIPPEL: It should be right under  
19 the caption of the case, and if you want to file --  
20 perhaps, I'm suggesting this now, maybe the simple  
21 thing to do would be just to refile the cover sheet in  
22 the proper format addressed to me and then --

1 MS. PARK: Yes, your Honor.

2 JUDGE SIPPEL: -- once you do that, then  
3 Ms. Berlove, you can have, what is it, the 10 days.

4 MS. BERLOVE: Your Honor, because of the  
5 nature of the complexity of the arguments raised in  
6 the Motion to Modify, we would request 14 days to  
7 respond rather than 10.

8 JUDGE SIPPEL: Any objection to that?

9 MS. PARK: No objection.

10 JUDGE SIPPEL: You have the 14 days.

11 MS. BERLOVE: And is -- will there be a  
12 motion to the Commission to withdraw the Motion to  
13 Modify just so that there is no risk of having the  
14 Commission rule on the original motion.

15 JUDGE SIPPEL: Well, yes, that's what I'm  
16 assuming. What I want to see is, I want to see the  
17 revised cover sheet or first page rather of the  
18 motion. That's what I want to see. What it takes to  
19 get to that, it's up to you all to decide. Certainly  
20 a request of some sort to the Commission to remove the  
21 issue from its docket, if it's been docketed or just  
22 to reserve -- I don't know how you want to phrase that

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1 but, yes, if we could have something in the record  
2 that it's been -- it's either moved or requested of  
3 the Commission or the Commission has agreed with you  
4 and said fine.

5 MS. BERLOVE: I assume that motion will be  
6 filed by Ms. Park as opposed to the Bureau.

7 JUDGE SIPPEL: That would make sense.

8 MS. PARK: Yes. And I don't mind filing  
9 that motion and you know, the content of the motion is  
10 just going to state that it was never intended for the  
11 Commission. It's currently before your Honor. When  
12 your Honor rules to the extent that it's within his  
13 authority, then we will send it right back to the  
14 Commission.

15 JUDGE SIPPEL: All right, well, at the  
16 time that you're filing with the Commission, let me  
17 suggest this: one of the attachments to what you're  
18 filing could be the revised first page, showing that  
19 it's being addressed to me and then just send me a  
20 copy of that pleading and that will be fine. That  
21 will do it.

22 MS. PARK: Yes, your Honor.

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1 JUDGE SIPPEL: And then I'll issue a short  
2 order. I mean, it's only fair to you, Ms. Berlove,  
3 where you start your count on the 14 days.

4 MS. BERLOVE: That's what I was going to  
5 actually ask your Honor, is when do the 14 days begin.

6 JUDGE SIPPEL: Once I receive a copy. I  
7 don't even have to have the original. Once I receive  
8 a copy of that document being filed with the  
9 Commission, I will issue a short, very short order,  
10 setting down --

11 MS. BERLOVE: Meaning the consent motion,  
12 consent to withdraw?

13 JUDGE SIPPEL: Well, yes, that's exactly  
14 right. A consent motion would even be better because  
15 I know that the Commission -- I mean, that's going to  
16 be the end of it.

17 MS. BERLOVE: Yes, I mean, if it's a  
18 consent motion, I think it will be dealt with far more  
19 quickly.

20 JUDGE SIPPEL: Yes, I just want to be sure  
21 that that's in the record before I move on it, that's  
22 all. I'll move on it promptly and then you can get

1 your 14-day count and we can go from there.

2 MS. BERLOVE: Okay, thank you, your Honor.

3 JUDGE SIPPEL: I just -- it's not really -  
4 - I don't want to spend -- you know, there's so much  
5 work to be done on this case, I don't want to spend  
6 too much more time on this but let me just say as a  
7 general proposition, I've had this before, if a  
8 constitutional issue is raised in a litigation issue  
9 that I'm handling, generally, that's an issue for the  
10 Commission to decide. And I've so ruled that way. I  
11 mean, I'm not going to throw a case out or throw an  
12 issue out on anyone because it's unconstitutional.  
13 That's really not my job. My job is to find the facts  
14 and apply the facts to the law under the issues that  
15 we're litigating here and not to reach out for things  
16 like constitutional or policy-related issues.

17 So I just caution you on that. It's a  
18 very thorough pleading, so I'm going to spend the  
19 necessary time to go through it and I'll pay close  
20 attention, of course, to your opposition and there we  
21 go. So you can reply again --

22 MS. PARK: Yes, sir.

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1 JUDGE SIPPEL: -- to Ms. Berlove's  
2 opposition since it's going to be, you know, a bit  
3 beefed up.

4 MS. PARK: The main thing that we're  
5 interested in, as you mentioned, that you probably  
6 won't deal with the constitutional issues, we would  
7 like to get individual liability against the Misters  
8 Kintzels removed from this case and that's not  
9 constitutional. Can you deal with that, your Honor,  
10 or would that be something that --

11 JUDGE SIPPEL: You give it to me, and I'll  
12 tell you whether I can deal with it.

13 MS. PARK: Yes, it's in the motion, sir.

14 JUDGE SIPPEL: All right. I'm just -- I  
15 mean, I guess what I'm really doing is cautioning you  
16 for anything -- any further filings in the case, just  
17 a little bit of word of caution. That some of these  
18 issues -- I'm just looking at how your table of  
19 contents reads. You know, some of them seem to go in  
20 that direction. But that's all I want to say. Okay,  
21 we're set to go.

22 All right, let me see, I've gotten all the

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1 way to C. What is D? Oh, this is -- well, this is  
2 it, that we just talked about really, the request that  
3 I rule on the Motion to Modify, so, okay. That's  
4 handled, too.

5 MS. BERLOVE: So, your Honor, I'm assuming  
6 you don't need a response from us to the request.

7 JUDGE SIPPEL: No, good question, but, no,  
8 no. We've just changed -- we've changed the track on  
9 which the train is going to run and so there's no  
10 pleading required. And I will note all this in an  
11 order reflecting what happened today so that nobody  
12 will be -- I don't want to leave any loose ends any  
13 more than you do. No pleading required by Bureau.

14 Okay. Let's see, we haven't even gotten  
15 to business yet. I'm going to -- what I'm going to do  
16 is I'm going -- in light of all of this and these  
17 things have to be paid attention to, the preliminary  
18 matters that we just discussed, I'm not going to defer  
19 anything until I rule on the Motion to Modify. I'm  
20 certainly not going to delay anything for that, but I  
21 do certainly have to address the motion to intervene  
22 as quickly as I can.

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1 I'm not really in a position to set dates  
2 today. I don't even know if counsel -- I would listen  
3 to anything that counsel has, if you have any ideas on  
4 that.

5 MS. BERLOVE: Your Honor, given that we do  
6 not know yet whether NASUCA is going to be added as a  
7 party, I don't think it would make sense to set a  
8 timetable quite yet, and since the Motion to Modify  
9 may or may not result in a narrowing of the issues and  
10 the parties, it would make sense to hold off.

11 JUDGE SIPPEL: All right. What I want to  
12 do is ask the parties to submit a proposed procedural  
13 and hearing dates. Could you do that by the middle of  
14 December without us having to reconvene?

15 MS. BERLOVE: Submit proposed dates?

16 JUDGE SIPPEL: Yes.

17 MS. BERLOVE: Sure, your Honor.

18 JUDGE SIPPEL: And then I'll see where  
19 things are -- that would be the middle, that would be  
20 before the vacation period, you know. Well, I'll  
21 determine as to whether or not -- you know, when and  
22 whether we need another prehearing conference on any

1 of these mechanics, but if I get the proposed dates,  
2 that gives me a plan and I want to let you know up  
3 front, too, that I, from March 13<sup>th</sup> to April 3<sup>rd</sup>, I'll  
4 be back on April 3<sup>rd</sup>, but I'll be in Germany visiting  
5 grandchildren. So I will be unavailable during that  
6 period of time.

7 MS. BERLOVE: Your Honor, do you want that  
8 submission to be a joint submission to the extent  
9 possible?

10 JUDGE SIPPEL: Yes, oh, yes, I'm sorry,  
11 yes, because I was looking -- yes, that would be a  
12 joint proposed procedural and hearing dates.

13 MS. BERLOVE: And when you say by mid-  
14 December --

15 JUDGE SIPPEL: Let me give you a date.  
16 How about December 14? Is that a good day? That's a  
17 Friday.

18 MS. BERLOVE: Your Honor, I will be on the  
19 last day of my vacation on the 14<sup>th</sup>.

20 JUDGE SIPPEL: Well, you have something to  
21 look forward to.

22 MS. BERLOVE: Would it be possible to do

1 it the following Friday, the 21<sup>st</sup>?

2 JUDGE SIPPEL: I don't see any problem  
3 with that. Let me see, Ms. Park, any problem with  
4 you?

5 MS. PARK: The 21<sup>st</sup> is fine, your Honor.

6 JUDGE SIPPEL: Let's do it on the 21<sup>st</sup>.  
7 I want you to have something to look forward to.  
8 Okay.

9 MS. BERLOVE: And that would simply be  
10 setting forth a proposed schedule for discovery,  
11 motions, hearing, et cetera?

12 JUDGE SIPPEL: Exactly, exactly, exactly  
13 and it's nothing that -- you know, Ms. Lancaster can,  
14 well, be thinking about it, too, but it's -- these are  
15 not dates that are going to be set in stone. It's what  
16 you and Ms. Park feel are reasonable dates for your  
17 preparation and hearing. And if I like them, then  
18 fine. If not, we'll talk about it. And I don't mind  
19 talking about things like that on a telephone  
20 conference, you know, with a record made after the  
21 telephone conference as to what happened.

22 I mean, I do that with a degree of

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1 frequency. It saves time and effort of running up and  
2 down to a hearing room simply to talk about dates. So  
3 if you have something that comes up and you feel that  
4 you can't get it resolved between the two counsel or  
5 three counsel, whatever might be in here, don't  
6 hesitate; give me a heads up. Ms. Gosse is here and  
7 just give her a heads up as to when you want to do it  
8 and what you want to talk about and I'll be happy to  
9 accommodate that.

10 MS. BERLOVE: Your Honor, do you  
11 anticipate ruling on the Petition to Intervene prior  
12 to that time?

13 JUDGE SIPPEL: I'm expecting to get that  
14 off my desk before I have any turkey on Thursday, so  
15 if turkey it is, but yes, yes, the answer is yes.

16 MS. BERLOVE: Okay, thank you, your Honor.

17 JUDGE SIPPEL: I have nothing further.  
18 Does anybody else have anything further?

19 MS. BERLOVE: Your Honor, I do. Yesterday  
20 afternoon, we received the Kintzels' various responses  
21 to our Request for Admissions and the Bureau takes  
22 issue with a number of the objections lodged in the

1 responses and Ms. Park and I spoke this morning and it  
2 doesn't seem like we're going to be able to resolve  
3 the differences. So I would seek leave to file a  
4 motion to compel.

5 JUDGE SIPPEL: Yes, that's right in the  
6 rules, you can do that. Surely.

7 MS. BERLOVE: Thank you, your Honor.

8 JUDGE SIPPEL: And I was anticipating that  
9 also, which is why I say it's very premature to set  
10 dates. And even on December 21, you all might have a  
11 problem. Let's just see what can do by December 21<sup>st</sup>.  
12 Yes, the Motion to Compel, and then there will be a  
13 round of pleadings on that and then there we go.

14 Does -- I'm going to ask Ms. Park, do you  
15 have any intention to discover, seek discovery?

16 MS. PARK: Yes. And that's why, you know,  
17 I'm pleased to hear about the, you know, delay of  
18 setting dates and so forth, because I guess we mainly  
19 were planning to propound some interrogatories towards  
20 the Commission and I guess that's governed by the  
21 Freedom of Information Act and from what I understand  
22 about that, it's just -- you know, it takes the

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1 Government a while to respond to those.

2 I mean, technically they're supposed to  
3 respond between -- in 30 days, but it generally  
4 doesn't happen.

5 JUDGE SIPPEL: Let me ask the Bureau that.  
6 Do you have any -- would you have any problem with me  
7 ruling on that?

8 MS. BERLOVE: Ruling on the FOIA request?

9 JUDGE SIPPEL: Well, these would be  
10 questions. It would be -- in effect, I would be  
11 ruling on FOIA requests with basically the same  
12 standard, I think under the Rules of Discovery -- it's  
13 under FOIA anyway, and I'd be willing to do that  
14 rather than tie these things up with a 30-day delay.  
15 You might want to think about that. You might want to  
16 talk to your --

17 MS. BERLOVE: Yes, your Honor, I'm not in  
18 a position to respond to that right now.

19 JUDGE SIPPEL: Yes. Yes, I don't want to  
20 admit to it. I maybe admitting to something wrong or  
21 something, but I think, I'm quite confident I've done  
22 this before. I don't think that it's necessary under

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1 the rules and under the authority that the ALJs have,  
2 you know, to wait for all of that rigamarole with  
3 going to the FOIA Department, and all that time-  
4 consuming stuff.

5 MS. BERLOVE: Yes, like I said, I'm not in  
6 a position to address that.

7 JUDGE SIPPEL: That's fine, think about  
8 it.

9 MS. BERLOVE: But were that to be the  
10 case, we would obviously want an opportunity to  
11 respond --

12 JUDGE SIPPEL: Oh, you would?

13 MS. BERLOVE: -- to the request, to the  
14 extent that there are any issues as to confidentiality  
15 and the like, but as I said, I would need to go back  
16 and confer with FOIA attorneys.

17 JUDGE SIPPEL: Yes, the way I would prefer  
18 to handle it would be as, you know, a request for  
19 documents as, you know, typically done under Rule 34  
20 of the Federal Rules and you would respond to it and  
21 one of the objections might be, certainly we'd expect  
22 it to be, that while it's protected under certain

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1       circumstances, you know, it's confidential, it's --  
2       you know, deliberations, all that kind of stuff.

3               MS. BERLOVE: I'm just not certain that it  
4       could be done by a simple document request, since the  
5       rules provide that document requests are not to be  
6       propounded on the Bureau.

7               JUDGE SIPPEL: Well, I bet that request  
8       would not be that simple, though. I mean, it would be  
9       a good, solid request. It's just a question of trying  
10      to undercut this -- and I'm not critical, but just  
11      that it's in the nature of things. You know, when you  
12      go through those FOIA proceedings, you just have to  
13      wait.

14              MS. BERLOVE: Yes, I would need to confer  
15      with our FOIA attorneys on that, your Honor.

16              JUDGE SIPPEL: All right, okay. Let's  
17      see. Okay, I guess that's it. Oh, yes, I did have  
18      another question with respect to discovery and that is  
19      depositions. Is either party -- wait a minute, I  
20      haven't even asked Ms. O'Neill (sic) what would you be  
21      needing for discovery in this case if you came in?  
22      You know, in broad terms.

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1 MS. O'REILLY: I think very, very limited  
2 discovery and, again, as Ms. Berlove has said, it  
3 would depend on whether the ruling on the Motion to  
4 Modify resulted in any change in the scope of issues.

5 JUDGE SIPPEL: Okay.

6 MS. BERLOVE: And, your Honor, we are  
7 going to be requesting the issuance of a number of  
8 subpoenas. We're going to be wanting some  
9 depositions, serve interrogatories, and document  
10 requests and the like. And I'm assuming that even  
11 though a schedule has not yet been set, we are free to  
12 move forward with that as --

13 JUDGE SIPPEL: Absolutely.

14 MS. BERLOVE: Okay.

15 JUDGE SIPPEL: No, this is not -- anything  
16 that's going on here, is not going to delay anything  
17 on the discovery side, with the exception, of course,  
18 of the intervener, because I have to rule on that.  
19 No, please, I was happy to see that you got your  
20 discovery documents out right away. And I'd suggest  
21 that you move on those, too, Ms. Park.

22 MS. PARK: Yes, your Honor.

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1 JUDGE SIPPEL: Because they take time,  
2 they take time. And I hope that I'm not being  
3 unrealistic to put you through the burden of coming up  
4 with dates by the 19<sup>th</sup>, but it may be that you -- why  
5 don't you do this; why don't you send me by the 21<sup>st</sup>,  
6 rather, a status report.

7 MS. BERLOVE: As opposed to a proposed  
8 schedule?

9 JUDGE SIPPEL: Well, you can include in  
10 there that, if you can come up with proposed dates, if  
11 you feel comfortable with them, you can set them down.  
12 If you have reasons as to why it's premature for those  
13 dates, you can just give me a short explanation of  
14 that.

15 Okay, that will do it. That will do it,  
16 and I hope I remember that change in the -- okay.  
17 Status report, preferably joint, but it doesn't have  
18 to be joint if you can't agree on it. Joint if  
19 possible, on the 21<sup>st</sup> of December; okay? I think  
20 that's it. Anybody else have anything more for this  
21 morning?

22 MS. BERLOVE: No, your Honor?

1 JUDGE SIPPEL: No?

2 MS. O'REILLY: No, your Honor.

3 JUDGE SIPPEL: No? Thank you very much.

4 We're in recess until the next call and have a good

5 Thanksgiving. Thank you. We're off the record.

6 (Whereupon, at 10:17 a.m. the

7 hearing in the above-entitled

8 matter recessed sine die.)

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Name of Hearing

EB DOCKET NO. 07-197

Docket No. (if applicable)

445 12<sup>th</sup> STREET, S.W., WASHINGTON, D.C.

Place of Hearing

November 15, 2007

Date of Hearing

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November 15, 2007

John Mongoven

Date

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